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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. VINCENTE EDWARD ALVES, Defendant and Appellant.	D052452 (Super. Ct. No. SCS203607)

APPEAL from a judgment of the Superior Court of San Diego County, William H. Kennedy, Judge. Affirmed as modified.

A jury convicted Vincente Edward Alves of first degree murder (Pen. Code,[1] § 187, subd. (a)) and discharging a firearm at an occupied motor vehicle (§ 246). The jury also found that the murder was willful, deliberate and premeditated (§ 189) and was committed by means of lying in wait (§ 190.2, subd. (a)(15)), and that Alves personally

1 All statutory references are to the Penal Code unless otherwise indicated.

discharged a firearm causing death (§ 12022.53, subd. (d)). The trial court sentenced Alves to life in prison without the possibility of parole.

Alves raises three contentions on appeal. First, he contends that the trial court abused its discretion by precluding a defense psychologist from informing the jury that prior to the murder two other mental health professionals had diagnosed Alves with major depression. Second, Alves argues there is no substantial evidence in the record to support the jury's lying-in-wait finding. Third, Alves argues, and the Attorney General agrees, the trial court erred in imposing a parole revocation fine because, given Alves's sentence, he will not be eligible for release on parole. (See § 1202.45.) We agree that the fine was erroneously imposed. We, therefore, strike the parole revocation fine. We conclude that Alves's other contentions are without merit and affirm the judgment in all other respects.

FACTS

In July 2006, Brittany Jiggens was married to Alves, but had filed for divorce and was living with Mark Fisher. On the morning of July 17, Jiggens and Fisher walked out of Fisher's apartment toward Jiggens's car, which was parked across the street. Jiggens observed a silver SUV parked across the street as well. Alves got out of the SUV and approached her. As Jiggens reached her car, she noticed a bag inside the car that she had not seen before. Jiggens asked Alves about the bag and he responded that it contained some of her things. Alves then handed Jiggens a valet key to her car. Jiggens thanked Alves and he said, "You're welcome."

Alves walked to the other side of Jiggens's car where Fisher had gotten into the front passenger seat and closed the door. Jiggens got in on the driver's side. Before Jiggens could start the car, Alves shot Fisher repeatedly, with a Walther .40 caliber semiautomatic pistol, through the passenger side window. Alves then returned to his SUV and drove away. Fisher died at the scene of multiple gunshot wounds. Shortly after the shooting, Alves e-mailed Jiggens via his cell phone, "Really sorry if you were injured. I tried to be careful."

DISCUSSION

Alves raises three separate challenges on appeal. We address each challenge separately below.

I.

The Trial Court Did Not Abuse Its Discretion in Limiting the Defense Expert Testimony

Alves contends that the trial court abused its discretion in limiting the testimony of a defense witness, psychologist Katherine Di Francesca. Before analyzing this contention we first set forth the pertinent procedural history.

A. *Procedural History*

Prior to trial, the prosecution filed a motion seeking to exclude or limit the testimony that could be provided by Di Francesca and asking the court to hold a hearing

under Evidence Code section 402 prior to allowing the testimony. The judge granted the request for a section 402 hearing.[2]

At the hearing, which was held outside the presence of the jury, Di Francesca testified that based on her evaluation of Alves and her review of his medical records, she had diagnosed him with "major depression" as well as a personality disorder with "schizoid, avoidant and dependent characteristics." Di Francesca explained that Alves previously had been diagnosed with major depression in high school and again in 2006 by treatment providers at the Harris Counseling Center. Di Francesca also testified about Alves's difficult childhood and desire to kill himself in front of Jiggens. At the conclusion of the evidentiary hearing, the trial court asked counsel for briefing regarding the admissibility of Di Francesca's testimony.

In its briefing, the prosecutor contended that Di Francesca should not be permitted to relate statements by Alves that he planned to kill himself (rather than Fisher) when he confronted Jiggens on the day of the murder, or statements regarding Alves's childhood, including that he cut himself on his arms in high school in response to rejection by a female high school friend. The prosecutor acknowledged that the "[d]octor can testify she has reviewed evidence supporting a diagnosis of depression from Tulare County," but the "details are not required or permitted." The prosecution also objected to any testimony that "somebody unnamed" at Harris Counseling Center diagnosed Alves with

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[2] Evidence Code section 402, subdivision (b) provides that "[t]he court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury . . . ."

major depression. The prosecutor argued that if the defense wanted to admit evidence regarding a prior diagnosis, "it need[ed] to produce the author of the diagnosis so he [or she] can be cross-examined."

The trial court filed a written ruling on the admissibility of Di Francesca's proposed testimony. The ruling states, in pertinent part:

> "(2) [Di Francesca] may testify to her diagnosis as to what, if any, mental illness she opines the defendant has. She may testify as to what symptoms she diagnosed in the defendant so long as she does not opine that as a result of such mental illness, the defendant did not have the capacity to form any required intent/mental states."
>
> "(4) [She] may testify that she relied on the previous records from Tulare County and notes received from Harris Counseling Center in forming her opinion; she may not put inadmissible hearsay in front of the jury because no foundation has been laid for its admissibility and the People have no one to cross-examine regarding its contents."

At the time of the Evidence Code section 402 hearing, it was unclear whether Alves would testify. In fact, Alves did testify in his own defense, mooting some of the prosecution's objections to Di Francesca's testimony by relating statements regarding his difficult childhood and desire to kill himself in front of Jiggens directly to the jury.

Alves testified that he was depressed throughout his childhood, would regularly cut himself with a razor blade on his arms and wrists "[b]ecause the physical pain was easier to deal with than the emotional pain" and contemplated suicide "[o]n a regular basis." Alves also testified about the incident when he slit his wrists in high school after a female friend rejected his advances. Alves testified that he received mental health counseling after that incident and again after his marriage to Jiggens deteriorated. Finally, Alves testified that in April 2006 he lost his job and by July 2006 had run out of

money and been served with an eviction notice. Alves said that he confronted Jiggens on the morning of July 17th with the intent to kill himself. He did not want to talk to her in front of someone else, however, and when he saw Fisher, he just handed Jiggens her key. Then, Fisher "gave [him] a fucked-up look," and Alves "lost it, fucking went crazy" and "shot him." Alves also testified that he told two psychologists that he had intended "to shoot myself," not Fisher.

Di Francesca's testimony followed. The trial court warned defense counsel at the outset of her testimony that while Di Francesca was permitted to rely on the evaluations of other experts, she cannot "say the [other doctor's] diagnosis is major depression."

Di Francesca testified that she had reviewed "psychotherapy notes from Tulare County from 2000[,] psychotherapy notes from the Harris Counseling Center from 2006," "another psychologist's report," defense investigative reports and police reports. She had also interviewed Alves twice.

Di Francesca testified that Alves was seen at the Tulare mental health facility on April 3, 2000, and had been diagnosed with a "certain mental health problem" which Di Francesca considered in forming her opinions. Di Francesca also testified that Alves was seen in 2005 and 2006 by the Harris Counseling Center, and that she had "consider[ed] those reports and the diagnosis made by that facility" when she formulated her opinion as to Alves's "mental health problems." Di Francesca opined that Alves "suffers from a major depression, and additionally he has a history of dysthymic disorder, which is chronic depression but less extreme. Additionally, he has a personality disorder." Di Francesca then explained the conditions she had referenced in greater detail

and described the typical symptoms and challenges faced by a person suffering from these disorders.

B. *The Trial Court Did Not Abuse Its Discretion*

Alves contends that the trial court's ruling that Di Francesca could not relate the "prior diagnoses made by Tulare County Mental Health and Harris Counseling Center that she relied upon in making her diagnosis of appellant's mental health condition" constitutes reversible error. We disagree.

A witness is generally precluded by the hearsay rules from including in her testimony the out-of-court observations of third parties. This rule is relaxed, however, in the context of expert testimony. Experts are permitted to rely on certain types of hearsay evidence in forming an opinion and can normally recount the information they relied on for the jury. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618 (*Gardeley*); Evid. Code, §§ 801, 802.) This otherwise inadmissible evidence, however, is permitted solely to supply the grounds for the expert's opinion and cannot be considered by the jury for its substantive truth. (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1295 (*Jantz*) ["An expert may base his opinion on reliable hearsay, and may disclose such information to explain the reasons for his or her opinion, as long as the information is not considered for its truth"].)

The exception permitting expert witnesses to incorporate hearsay into their testimony is not without limits. "Although an expert may base an opinion on hearsay, the trial court may exclude from the expert's testimony 'any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative

value.'" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1172.) A trial court "'has considerable discretion'" in making these determinations and will be reversed on appeal only for an abuse of that discretion. (*Gardeley*, *supra*, 14 Cal.4th at p. 619; *People v. Valdez* (1997) 58 Cal.App.4th 494, 510 ["disputes in this area must generally be left to the trial court's sound judgment"].)

We find no abuse of discretion in the instant case. While a trial court must be careful not to unnecessarily limit the presentation of defense evidence, the trial court's limitation on the expert's testimony here was very narrow. The trial court merely prevented Di Francesca from repeating the out-of-court diagnoses made by non-testifying doctors. Further the jury was likely able to infer the out-of-court diagnoses, as Di Francesca specifically informed the jury she had relied on those diagnoses in reaching her conclusion that Alves suffered from major depression and had a history of mental illness. Di Francesca also stated that Alves "was treated for depression both at Tulare County Mental Health and at the Harris Counseling Services" — something that would have been anomalous had he not been previously diagnosed with depression. Alves also testified to his history of depression and periodic receipt of counseling.

Thus, the defense lost very little by virtue of the trial court's ruling. The mere recitation of the diagnosis of other doctors was all that was forbidden. Further, even had this testimony been permitted, the jury could have considered the previous diagnoses solely in evaluating Di Francesca's testimony. The jury would not have been permitted to accept the out-of-court diagnoses for their truth. (*Jantz*, *supra*, 137 Cal.App.4th at pp. 1295-1296.)

Finally, the trial court's ruling did not preclude the defense from introducing the previous diagnosis of depression, but merely required the defense to do so through the doctors who had actually made the diagnosis.

On the other side of the equation, the trial court's ruling was grounded in a legitimate concern that the jury would not have any basis upon which to evaluate the out-of-court diagnoses. The jury had no information regarding the qualifications or credibility of the doctors who made the diagnoses and the prosecution would have been unable to test those diagnoses, unlike that of Di Francesca, through any meaningful cross-examination. (See *People v. Campos* (1995) 32 Cal.App.4th 304, 308 (*Campos*) ["An expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts. '"'The reason for this is obvious. The opportunity of cross-examining the other doctors as to the basis for their opinion, etc., is denied the party as to whom the testimony is adverse'"'"].)

In light of the legitimate concerns expressed by the court and the narrow limitation placed on the testimony of the defense expert, we cannot conclude that the trial court abused its discretion. Indeed, the trial court's ruling is well within the bounds of existing law. (See *People v. Catlin* (2001) 26 Cal.4th 81, 137 ["Although it is appropriate for a physician to base his or her opinion in part upon the opinion of another physician [citations], it generally is not appropriate for the testifying expert to recount the details of the other physician's report or expression of opinion"]; *Campos*, *supra*, 32 Cal.App.4th at p. 308 ["'[D]octors can testify as to the basis for their opinion . . . , but this is not intended to be a channel by which testifying doctors can place the opinion of innumerable out-of-

court doctors before the jury'" (citation omitted)], quoting *Whitfield v. Roth* (1974) 10 Cal.3d 874, 895]; see also *People v. Young* (1987) 189 Cal.App.3d 891, 913 ["While Drs. Stalberg and Sharma could rely on hearsay psychiatric reports of other doctors as bases for their opinions on appellant's sanity, the reports remained inadmissible hearsay. The rule which allows an expert to state the reasons upon which his opinion is based may not be used as a vehicle to bring before the jury incompetent evidence"]; *People v. Piper* (1980) 103 Cal.App.3d 102, 112 ["the prosecutor acted properly when he asked the criminalist *whether* he consulted another criminalist before rendering a final opinion, but the prosecutor sought inadmissible hearsay testimony when he asked for the content of that second opinion"].)

Having determined that the trial court did not abuse its discretion, we also reject, for the same reasons, the parallel claim that the trial court's ruling violated Alves's constitutional right to present a defense. Alves's defense — that he was "severely depressed the morning that the shooting occurred, and . . . planned to kill himself, not the decedent Fisher" — was fully presented to the jury, and the narrow limitation placed on Di Francesca's testimony did not amount to a constitutional violation. (See *People v. Hall* (1986) 41 Cal.3d 826, 834 ["As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense"]; compare *Crane v. Kentucky* (1986) 476 U.S. 683, 691, 690 [state court's exclusion of evidence surrounding circumstances of defendant's disputed confession despite the absence of "any rational justification for the wholesale exclusion of this body of potentially exculpatory

evidence" violated defendant's right to "'a meaningful opportunity to present a complete defense'"].)

II.

Substantial Evidence Supports the Jury's Lying-in-wait Finding

Alves next argues that the jury's finding on the lying-in-wait special circumstance must be reversed because it is not supported by substantial evidence. We disagree.

In evaluating a challenge to the evidence supporting a jury's verdict, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66 (*Snow*).) Reversal is not warranted "unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) In performing our review of the record, we are limited by the fact that it "'"is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends."'" (*People v. Smith* (2005) 37 Cal.4th 733, 739.) We are, thus, not permitted "to reweigh the evidence or redetermine issues of credibility" (*People v. Martinez* (2003) 113 Cal.App.4th 400, 412), and even the "uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.)

The jury was instructed on the lying-in-wait special circumstance with the standard instruction contained in CALCRIM No. 728, which required that the jury find the defendant "intended to kill a person by taking the person by surprise," "concealed his purpose from the person killed," "waited and watched for an opportunity to act" and "made a surprise attack on the person killed from a position of advantage." The instruction also stated that: (i) "[t]he lying in wait does not need to continue for any particular period of time, but its duration must be substantial and show a state of mind equivalent to deliberation or premeditation"; and (ii) "[a] person can conceal his or her purpose even if the person killed is aware of the other person's physical presence." (See CALCRIM No. 728.)

Alves does not dispute the propriety of the jury instruction, but contends that the prosecutor "failed to present evidence showing a substantial period of watching and waiting for an opportune time to attack."

Alves bases this contention on the evidence regarding his conduct the morning of the murder — primarily his own testimony. According to Alves's testimony, he first went to the scene of the murder at around 4:00 on the morning of July 17th. He put some items into Jiggens's car and left. Alves went home, "went on the Internet for a little bit" and returned to the scene at around 6:30 a.m. Alves testified that soon after he arrived, he saw Jiggens and Fisher leaving Fisher's apartment and approaching Jiggens's car. Alves notes his testimony on this point was corroborated by a prosecution witness who testified that Alves's computer had been accessed between 5:08 and 5:37 in the morning on the day of the murder. Given this evidence, and the absence of any other evidence regarding

his actions on that morning, Alves contends any conclusion that he "waited in the SUV for more than a few seconds . . . would amount to speculation."

Alves's challenge ignores that even if he is correct that there was only a short period of watching and waiting, this is not dispositive. While the watching and waiting must be "'substantial'" to support a lying-in-wait finding, the "'precise period of time'" spent waiting is "'not critical'" and there is no "fixed time limit." (*People v. Moon* (2005) 37 Cal.4th 1, 23 (*Moon*); *People v. Ceja* (1993) 4 Cal.4th 1134, 1145 (*Ceja*) ["The precise period of time is . . . not critical"].) Further, it is the concealment of purpose that is the essence of the lying-in-wait special circumstance, not a concealment of presence. (*People v. Morales* (1989) 48 Cal.3d 527, 554-555 (*Morales*) ["physical concealment from, or an actual ambush of, the victim is not a necessary element of the offense of lying-in-wait murder"]; *People v. Stevens* (2007) 41 Cal.4th 182, 202 (*Stevens*) ["The purpose of the watching and waiting element is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse"].) "'"'The element of concealment is satisfied by a showing "'that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim.'"'"'" (*Stevens*, at p. 202, quoting *People v. Hillhouse* (2002) 27 Cal.4th 469, 500 (*Hillhouse*).) "The factors of concealing murderous intent, and striking from a position of advantage and surprise," rather than a lengthy period of physical concealment and observation, "'are the hallmark of a murder by lying in wait.'" (*Stevens*, at p. 202.)

With these principles in mind, it is clear that the jury's finding is supported by substantial evidence. Alves initially concealed his presence from Jiggens and Fisher, emerging unexpectedly from a parked, rental SUV in the early morning hours as they neared Jiggens's car. Alves then matter-of-factly informed Jiggens that he had placed some of her items in her car, returned her valet key to her and politely said, "You're welcome," after she thanked him.

While concealing a loaded, high-powered handgun in his pants, Alves did not voice any hostile words or make any aggressive gestures and had no interaction whatsoever with Fisher. Alves then waited until Fisher got into Jiggens's car and sat in the passenger seat with the door closed and the window rolled up. Once Fisher was in this position, it became virtually impossible for Fisher to defend himself or resist in any way. (*Ceja*, *supra*, 4 Cal.4th at p. 1145 [emphasizing, in support of lying-in-wait finding, inference that victim "reached the place of *maximum vulnerability*" before defendant attacked].) As Fisher sat in the car, unsuspecting, Alves walked around to the passenger side and without any warning, pulled out the handgun and shot Fisher four times through the glass.

Given these facts, a reasonable jury could conclude that Alves's conduct satisfied the prerequisites for the lying-in-wait special circumstance. (*Snow*, *supra*, 30 Cal.4th at p. 66.) Alves's initial concealment of his presence and later concealment of purpose until Fisher was in a position of extreme and unsuspecting vulnerability established "'the elements of waiting, watching and concealment or other secret design to take the victim unawares and by surprise . . . .'" (*Moon*, *supra*, 37 Cal.4th at p. 24; *Morales*, *supra*, 48

Cal.3d at pp. 555-556 [lying-in-wait finding supported despite victim's awareness of the defendant's presence by "defendant's watchful waiting, from a position of advantage in the backseat" of a car "while the car was driven to a more isolated area, and his sudden surprise attack, from behind and without warning"]; *Stevens, supra*, 41 Cal.4th 182, 203 [lying-in-wait finding supported by evidence that defendant approached a car by pulling over next to it, concealed his deadly purpose and shot the driver when the car slowed down: "This process may not have taken an extended period, because defendant did not have to wait long until his next target became available. But there is no indication of rash impulse"]; *Hillhouse*, *supra*, 27 Cal.4th at p. 501 [sufficient evidence supported lying-in-wait finding where defendant killed victim shortly after victim got out of a truck to urinate where the defendant "took [the victim] by surprise with no opportunity to resist or defend himself"].)

The factual situation in the instant case is analogous to that addressed by our high court in *Moon*. In that case, the defendant claimed that the jury's lying-in-wait finding was not supported by substantial evidence because he waited only about 90 seconds before confronting and killing the victim. (*Moon*, *supra*, 37 Cal.4th at p. 23.) The Supreme Court rejected this contention, emphasizing that a short period of waiting prior to a killing did not preclude a lying-in-wait finding. The court held that the evidence was sufficient to support the lying-in-wait finding because the defendant briefly concealed his presence from the victim and, when he encountered her, initially concealed his purpose before "suddenly push[ing] her down the stairs and then strangl[ing] her." (*Id.* at pp. 22-23.)

In sum, as in *Moon*, even if there was only a short period of time between Alves's observation of Jiggens and Fisher and his ultimate attack, the totality of the evidence is sufficient to support the jury's lying-in-wait finding. (*Moon*, *supra*, 37 Cal.4th at pp. 23-24; *Morales*, *supra*, 48 Cal.3d at pp. 557-558 ["The question whether a lying-in-wait murder has occurred . . . must be made on a case-by-case basis, scrutinizing all of the surrounding circumstances"].)

III.

The Parole Revocation Fine Must Be Stricken

The parties agree that the trial court erred in imposing a parole revocation fine pursuant to section 1202.45. (§ 1202.45 [mandating imposition of a fine on any offender "whose sentence includes a period of parole"].) The fine does not apply because Alves was sentenced to a life sentence without the possibility of parole. (See *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.) Consequently, we will strike the parole revocation fine.

DISPOSITION

The $10,000 parole revocation fine imposed pursuant to Penal Code section 1202.45 is stricken. The superior court is directed to prepare an amended abstract of judgment reflecting this change and forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

MCINTYRE, J.